Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 88-838

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

REUBEN NIEVES, Appellant

vs.

MARINA GARDENS NO. 1, INC., Appellee

On Appeal From The Decision of The Court of Appeal of the State of California, First Appellate District, After Denial of Hearing by the Supreme Court of The State of California

MOTION OF APPELLEE TO DISMISS

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QUESTIONS PRESENTED FOR REVIEW

I. Does this Court have jurisdiction to determine federal questions which were not presented to, or decided by, the state court?

II. Does this Court have jurisdiction to review a decision of a state court based solely upon the res judicata effect of a final judgment in that state?

III. Do state common law principles of real property and res judicata raise a substantial federal question?

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On Appeal From The Decision of The Court of Appeal of the State of California, First Appellate District, After Denial of Hearing by the Supreme Court of The State of California

MOTION OF APPELLEE TO DISMISS

STATEMENT OF THE CASE

Appellant appeals from an unpublished decision of the California Court of Appeal, First Appellate District, which held that a prior final judgment between Appellant and Appellee is, under

California law, res judicata on the issue of the prior court's subject matter jurisdiction and all other issues decided therein, and remanded the case to the trial court for further proceedings consistent with the opinion.

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. section 1257 (2) on the grounds that the Court of Appeal decision is a final judgment or decree rendered by the highest court of the State of California, when the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. 12 U.S.C. section 1257 (2).

Appellee hereby moves to dismiss the appeal, and opposes the granting of a writ of certiorari, on the grounds that:

1. The federal question sought to be reviewed was not timely or properly raised, and was not expressly passed on by the California Court of Appeal;

2. The decision of the California Court of Appeal rests on an adequate non-federal basis; or

3. The appeal does not present a substantial federal question.

STATEMENT OF FACTS

Marina Gardens is an apartment complex consisting of 180 apartment units located in San Mateo, California. The real property is owned by Appellee, Marina Gardens No. 1, Inc. ("Marina Gardens"), a stock cooperative, non-profit corporation organized under the laws of the State of California.[1/]

1/ Marina Gardens No. 1, Inc. has no parent, subsidiary or affiliate company.

Appellant became a shareholder of Marina Gardens in 1980, having purchased the stock from a prior shareholder, and executed a lease with Marina Gardens for possession of an apartment located at 1554 "A" Day Avenue, San Mateo, California ("the apartment"), which lease provided that Appellant would not sublet the apartment without the consent of Marina Gardens.

In 1983, Appellant moved from Marina Gardens to a new residence in Redwood City, California, and sublet the apartment without the permission of Marina Gardens in violation of the lease. Marina Gardens filed an unlawful detainer action in the San Mateo Municipal Court pursuant to the California unlawful detainer statute (California Code of Civil Procedure section 1161) to recover possession of the apartment.

By demurrer and answer to the unlawful detainer complaint, by motion in a concurrent declaratory relief action filed by Appellant against Marina Gardens in the San Mateo Superior Court, and in the trial of the unlawful detainer action, Appellant raised the same claims that the Municipal Court did not have subject matter jurisdiction in the unlawful detainer action on the grounds that a landlord/tenant relationship did not exist, that Appellant's interest in the apartment was in excess of a term less than life, and, therefore, his interest was not subject to unlawful detainer. These claims were rejected, and an unlawful detainer judgment was ultimately issued by the San Mateo Municipal Court following the unlawful detainer trial. Appellant did not file an appeal of the judgment, and it became

final. No writ of possession was issued by the Court.

Since the unlawful detainer judgment terminated the lease, but not Appellant's ownership of his stock, following the trial, Marina Gardens and Appellant entered into a "Mutual Release and Agreement" ("the Agreement") on November 8, 1983, whereby Marina Gardens purchased Appellant's stock for $34,069.05, and Appellant released Marina Gardens from all claims arising out of the lease and the matters set forth in the Superior Court and Municipal Court actions, filed a dismissal with prejudice of the Superior Court action, and agreed not to file any action or make any claim for any injury or damage arising therefrom. Appellant's former attorney, who represented him in both actions, expressly acknowledged that the Agreement was executed by Appellant under his direction and advice.

In reliance on the Agreement, Marina Gardens issued stock to a new shareholder, who occupied the apartment pursuant to a new lease with Marina Gardens.

A new action was filed by Appellant, with a new attorney, in the San Mateo Superior Court in 1985, more than 1 1/2 years after the final termination of the prior two actions.

This third action, out of which Appellant's appeal to this Court arises, is for declaratory relief, quiet title, rescission, damages and related causes of action, which seeks a declaration that Appellant's interest in the apartment was in excess of a term less than life and not subject to an unlawful detainer action, that the San Mateo Municipal Court wrongfully assumed subject matter jurisdiction and wrongfully terminated Appellant's interest in the apartment, and

that he is, therefore, still the owner of the apartment, and seeks to rescind the Agreement on the grounds of an alleged mistake of fact and mistake of law that the San Mateo Municipal Court had jurisdiction of the unlawful detainer action, lack of consent and undue influence, actual and constructure fraud of Marina Gardens in misrepresenting to Appellant that the Municipal Court had jurisdiction in the unlawful detainer action.

Following motions for summary adjudication of Marina Gardens and Appellant, the trial court in the within action reviewed the pleadings, briefs, declarations and documents filed in this action, the 1983 Municipal Court unlawful detainer action, and 1983 Superior Court declaratory relief action, and, on October 22, 1986, entered an Order of Dismissal,

sua sponte, finding that the trial court herein had jurisdiction to review the jurisdiction of the Municipal Court in the 1983 unlawful detainer action, and to order, sua sponte, the dismissal of the complaint in the within action; that Sun Terrace Manor v. Municipal Court (1973) 33 Cal. App. 3d 739, is controlling in the within matter, and that the relationship between Appellant and Marina Gardens was that of landlord and tenant, subject to unlawful detainer; and that the San Mateo Municipal Court was a court of competent jurisdiction to hear and determine the 1983 unlawful detainer action. The trial court also found that the 1983 unlawful detainer judgment is a final judgment and is not subject to collateral attack, is res judicata, and operates as an estoppel and conclusive adjudication between Appellant and Marina Gardens as

to all issues of fact and law set forth in the findings of fact and conclusions of law in said unlawful detainer judgment.

Appellant appealed from this Order to the California Court of Appeal, raising two issues on appeal: 1. The San Mateo Municipal Court did not have subject matter jurisdiction in the unlawful detainer action; and 2. Appellant is not subject to an unlawful detainer action in any court, as his interest in the apartment constitutes an interest in real property in excess of a term for less than life - the interest required to come within the realm of an unlawful detainer action (California Code of Civil Procedure, section 1161). See Court of Appeal Opinion at p. 47 (set forth as Exhibit 2 of the Appendix of Appellant's Corrected Jurisdictional Statement, at pps. 32 -

65), which also contains a detailed statement of the facts and issues litigated by the parties in the 1983 Municipal Court and Superior Court actions.

The California Court of Appeal held, in its Opinion filed on May 26, 1988, under California law, "...the 1983 unlawful detainer judgment was res judicata on the issue of the municipal court's subject matter jurisdiction and of all other issues decided therein." (Opinion, pps. 33 and 34), and that:

> "...the present action is barred by the doctrine of res judicata to the extent that it raises claims and issues which were, or could have been, decided in the unlawful detainer action. In so holding we do not reach the merits of Nieves claims. We thus do not consider, as did the lower court, the validity of the municipal court's determination of its subject matter jurisdiction. As will be discussed below, the lower court did not have to reach that issue." Opinion, p. 49.

The Court of Appeal also did not consider the validity of Appellant's cause of action for rescission of the Agreement or for damages, but noted that since the Agreement was entered into after the unlawful detainer trial, this claim was not barred by res judicata, but Appellant's remedy would be limited to the recovery of monetary damages resulting from the loss of the ability to appeal. Id. at pps. 63 - 64. Since this cause of action was not barred by res judicata, the Court of Appeal reversed the Order of Dismissal, stating that under California law the trial court had the power to strike those causes of action which were barred by res judicata. The Court of Appeal remanded the case to the trial court for further proceedings consistent with the opinion. Id. at p. 65.

On June 10, 1988, Appellant petitioned the Court of Appeal for a rehearing, which was denied on June 23, 1988. On July 5, 1988, Appellant petitioned the Supreme Court of the State of California for review, which was denied on August 10, 1988. On October 14, 1988, Appellant filed in the Court of Appeal a Notice of Appeal to the Supreme Court of the United States.

On November 10, 1988, following Marina Garden's motion to strike and to dismiss, the trial court filed an order striking and dismissing seven causes of action of Appellant's complaint on the basis they were barred by res judicata.

SUMMARY OF ARGUMENT

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. section 1257 (2) on the grounds that the California Court of Appeal decision is a final judgment or decree rendered by the highest court of the State of California, when the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. 12 U.S.C. section 1257 (2).

Appellee moves to dismiss the appeal, and opposes the granting of a writ of certiorari, on the grounds that:

1. The constitutional questions sought to be reviewed were neither raised by Appellant, nor passed upon by the California Court of Appeal;

2. The decision of the California Court of Appeal was based solely upon the res judicata effect of a final judgment in California, an adequate state ground; or

3. State common law principles of real property and res judicata do not present a substantial federal question.

ARGUMENT

I.

THIS COURT HAS NO JURISDICTION TO DETERMINE FEDERAL QUESTIONS WHICH WERE NOT PRESENTED TO, OR DECIDED BY, THE STATE COURT.

This Court's appellate jurisdiction is invoked under 28 U.S.C. section 1257 (2) "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor its validity."

It is clear from the record, however, that Appellant neither raised the issue of the validity of the California unlawful detainer statute, either on its face or as applied, on the constitutional grounds alleged herein, nor did the California Court of Appeal pass upon any such issue.

Nowhere in the proceedings before the trial court or in his appeal to the Court of Appeal did Appellant claim or present the issue of the alleged unconstitutionality of the California unlawful detainer statute. This Court's jurisdiction must, therefore, fail since Appellant's claims of unconstitutionality were neither raised by him nor passed upon in the Court of Appeal. Cardinale v. Louisiana (1969) 394 US 437, 438, 89 S CT 1162, 22 L ed 2d 398.

Appellant complains that the California unlawful detainer statute prevented him raising his legal and

equitable claims and defenses in the unlawful detainer action, including his claims of unconstitutionality. From a review of the record and the Opinion of the Court of Appeal, however, it is clear that Appellant had a full and fair opportunity to present such claims and defenses, and extensively litigated them in the unlawful detainer action. See Court of Appeal's Statement of the Facts (Opinion, pps. 37 - 41), and its conclusions. Id. at pps. 56 and 60. Since no constitutional issues were raised by Appellant's prior attorney in the 1983 Municipal Court and Superior Court actions, nor by his present attorney in the trial court or Court of Appeal in this action, having had his claims rejected by these courts, it is apparent that Appellant has simply thought up a new claim of constitutional impairment, and now wishes to raise it before this Court.

Appellant contends that "the federal questions were properly and timely raised in the state's superior court action (seventh cause of action) and were necessarily reviewed and decided by the superior court to reach its judgment." Corrected Jurisdictional Statement, p. 14. The seventh cause of action, however, contains no allegations of constitutional impairment to the California unlawful detainer statute, and merely seeks state injunctive relief concerning Appellant's alleged right, title and interest in and to the apartment. In addition, the federal question must be raised and decided by the highest state court, here the Court of Appeal, and not the trial court. Lynch v. New York (1934) 293 US 52, 55 S CT 16, 79 L ed 191. The only questions raised by Appellant on appeal to the Court of Appeal were set forth by the

Court as follows: "1) the municipal court did not have subject matter jurisdiction in the unlawful detainer action; and 2) he [Appellant] is not subject to an unlawful detainer action in any court, as his interest in the apartment constitutes an interest in real property greater than a tenancy for less than life - the interest required to come within the realm of an unlawful detainer action. (Code Civ. Proc., section 1161.)" Opinion, p. 47.

Even if it is assumed, arguendo, that a claim for injunctive relief could somehow be deemed to include a claim that the California unlawful detainer statute is repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment, this Court would not have jurisdiction. The federal question, and the

grounds therefor, must be clearly brought to the attention of the highest state court:

> "Questions not raised below are those in which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, (citing authority), they should be given the first opportunity to consider them. Cardinale, supra at p. 439.

And see Lynch v. New York, supra at p. 54 ("...jurisdiction cannot be founded upon surmise....It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it

must appear affirmatively from the record ...."); and see Harding v. Illinois (1904) 196 US 78, 25 S CT 176, where this Court held that even where there are general allegations of unconstitutionality in the complaint, where no authorities are cited or arguments advanced in support of the claim that the state statute is unconstitutional, the Court may consider the federal grounds to have been waived by such conduct.

It is also clear that no federal question was decided by the Court of Appeal. It is essential to the jurisdiction of the Court in reviewing state court judgments, by appeal or writ of certiorari, that the federal question must be expressly decided by the highest state court:

> "...jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs

> and statements which are not part of the record. It...must appear affirmably from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it (citing authority)." (emphasis added) Lynch v. New York, supra at p. 54.

The Court of Appeal specifically declined to rule on the merits of Appellant's claims, and merely held that claims raised by Appellant in this action were raised and litigated by Appellant in the 1983 unlawful detainer action, and, therefore, were barred by the state common law doctrine of res judicata. The Court of Appeal, therefore, did not base its decision on any federal ground:

> "It is clear from the opinion cited that the state court based its decision upon other than Federal grounds, and

did not decide the constitutional question sought to be made here." Harding v. Illinois, supra at p. 88.

Since the constitutional questions sought to be reviewed were not timely or properly raised, and were not expressly passed on by the Court of Appeal, this Court has no jurisdiction to review the state decision by appeal or certiorari.

II.

THIS COURT HAS NO JURISDICTION TO REVIEW A DECISION OF A STATE COURT BASED SOLELY UPON THE RES JUDICATA EFFECT OF A FINAL JUDGMENT IN THAT STATE.

This Court has no jurisdiction to review state court judgments if the non-federal ground is adequate to support the judgment. Herb v. Pitcairn, (1945) 324 US 117, 65 S CT 459, 89 L ed 789. In Herb the Court set forth the rationale for this well settled doctrine:

> "the reason is...found in the partitioning of power between the state and federal judicial system and in the limitations of our own jurisdiction. Our only power over state judgements is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." pps. 125 - 126.

It is clear from the Opinion of the Court of Appeal that its decision was not based upon a federal ground. Indeed, the Court of Appeal expressly declined to rule on the merits of Appellant's claims:

> "We...hold that the present action is barred to the extent that it raises claims and issues which were, or could have been, decided in the unlawful detainer action. In so holding we do not reach the merits of Nieves' claims." Opinion, p. 49.

The highest state court expressly disclaimed any constitutional question and, therefore, jurisdiction fails. Harding v. Illinois, supra at p. 88.

The Court of Appeal's decision was based wholly on the issue of res judicata, a state common law doctrine. Contrary to Appellant's assertion, res judicata is hardly a novel state procedure which unfairly surprises litigants, as it did in NAACP v. Alabama (1958) 357 US 449, 78 S CT 1163, 2 L ed 2d, 488. Under the full faith and credit statute (28 U.S.C. section 1738), a federal court must refer to the laws of the state in determining the preclusive effect of state judgments, rather than employ its own rules of res judicata. Marrese v. American Academy of Orthopaedic Surgeons (1985) 470 US 373, 105 S CT 1327, 84 L ed 2nd 274.

The decision of the Court of Appeal on the res judicata issue was based upon its extensive review and analysis of the res judicata effect of final judgments in California (See Opinion, pps. 49 - 57), particularly the California Supreme Court decision in Estate of Estrem (1940) 16 Cal. 2d 563, which holds that res judicata applies to a determination by a court of its own subject matter jurisdiction when the question was duly litigated with notice and participation of the parties affected by it. The Court of Appeal noted that the issue of the Court's jurisdiction was extensively litigated by the parties in the unlawful detainer action and determined that a collateral attack of its judgment was not warranted. Opinion, pps. 55 - 57. State courts are free to determine the jurisdiction of their own courts under state law, in a

non-discriminatory fashion, even if such a determination would result in a dismissal of a federal cause of action. See Herb v. Pitcairn, supra at pps. 120 - 124.

This Court has no jurisdiction, therefore, since the decision of the Court of Appeal rests upon an adequate state ground.

III.

STATE COMMON LAW PRINCIPLES OF REAL PROPERTY AND RES JUDICATA DO NOT RAISE A SUBSTANTIAL FEDERAL QUESTION.

Appellant acknowledges that the federal question must be substantial to afford the basis for review by this Court. Appellant, however, mistakenly equates a substantial federal question merely with the allegation of a violation

of the Constitution or federal law ("'substantial federal question' -- i.e., a purported violation of the Constitution, a federal statute or treaty." Corrected Jurisdictional Statement, p. 13.) It is well settled that even though the validity of a law is formally drawn into question, the Supreme Court will decline jurisdiction whenever it appears to the court that it is not substantial in character. Zucht v. King (1922) 260 US 174, 176, 43 S CT 24, 67 L ed 194.

Guidelines for review are set forth in Equitable Life Assurance Society v. Brown (1902) 187 US 308, 311, 23 S CT 123, 47 L ed 190:

> "[I]t is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real, substantive question on which the case may be made to turn,' that is, 'a real, and not a merely formal, Federal question is essential to the jurisdiction of this court.'

> Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail." p. 311.

The alleged federal questions for which Appellant seeks review by this Court are set forth on page 14 of his Corrected Jurisdictional Statement: "1) the nature of the interest in the stock coop owned by Appellant, 2) the constitutionality of the summary proceeding to terminate and forfeit his interest, and 3) the right to bring a subsequent action for damages after the summary eviction proceeding."

1. The nature of the interest in the stock cooperative.

Appellant claims that the California unlawful detainer statute does not apply to him since:

> "...Appellant, owned under common law, an interest in excess of a term less than life. Under common law, Appellant owned a fee simple absolute subject to condition subsequent." Corrected Jurisdictional Statement, p. 13."

It is to state the obvious that there is no federal common law regarding real property, and the "Constitution has not federalized the substantive law of landlord-tenant relations..." Lindsey v. Normet (1972) 405 US 56, 68, 92 S CT 862, 31 L ed 2d 36. The nature of Appellant's property interest, and the applicability of a state remedy, is based solely upon state law.

Appellant mistakenly asserts that "Counsel for Appellee argued to the California Court of Appeals [sic] that federal law 'regulated' this [Appel-

lant's] interest and implied that Congress had somehow preempted real property law...." Corrected Jurisdictional Statement, p. 22. Appellee did not claim any such federal property law. In response to Appellant's claim that the requirement for him to assign any rental profit from a sublease with his alleged niece was an unreasonable restraint on alienation, Appellee pointed out to the Court of Appeal in its responding brief (at pps. 34 - 37) that the requirements set forth in the lease were required by the United States Department of Housing and Development, which insured the mortgage, and that a failure to enforce such provisions in the legal documents may be a breach of Appellee's Regulatory Agreement with HUD.

In any event, jurisdiction cannot be sustained by reference to briefs and statements not a part of the record

(Lynch v. New York, supra at p. 54), and the Court of Appeal expressly declined to rule on the merits of Appellant's real property claims.

2. The constitutionality of the unlawful detainer statute. This issue was not submitted to the trial court or Court of Appeal, nor did either court rule on this issue (see I., supra at p. 15).

In any event, this Court has reviewed and upheld the constitutionality of state summary remedies for possession of real property. See Lindsey v. Normet, supra:

> "This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review (citing authority). Lindsey, supra at p. 77.

After reviewing the voluminous record in the 1983 unlawful detainer action, the Court of Appeal found that

Appellant was afforded a full and fair opportunity to, and did, in fact, extensively litigate his claims of title to the real property and the propriety of the municipal court's jurisdiction over such interest in the unlawful detainer action, and concluded that "Nieves has had his day in Court." See Court of Appeal Opinion at pps. 56 and 60.

3. The right to a subsequent action for damages. The Court of Appeal decision sought to be reviewed, merely held that all issues which had been litigated, or which could have been litigated, by Appellant in the prior unlawful detainer action could not be relitigated.

The full faith and credit statute (28 U.S.C. section 1738) requires a federal court to refer to the preclusive law of the state in which judgment was ren-

dered to determine the preclusive effect of a prior state judgment. Marrese v. American Academy of Orthopaedic Surgeons (1985) 470 US 373, 105 S CT 1327, 84 L ed 2d 274.

The Court of Appeal reviewed California law and correctly stated that although unlawful detainer judgments do not normally preclude subsequent actions regarding title because issues of title are not ordinarily addressed in summary proceedings: "However, the full and fair adjudication in an unlawful detainer action of issues material to a determination of title stands as a conclusive determination of those issues. This is so even when the action takes place in a municipal court (Vella v. Hudgins (1977) 20 Cal. 3d 251, 257." Opinion, p. 57. The Court of Appeal analyzed the California Supreme Court decision in

Vella concerning the res judicata issue, and noted that even if the value of the real property exceeded the monetary jurisdiction of a municipal court, its judgment would preclude relitigation of title issues to the extent that the unlawful detainer action afforded the litigants a full and fair opportunity to litigate such matters. After reviewing the record in the 1983 action, the Court of Appeal concluded that Appellant "was afforded a full and fair opportunity to litigate the issues material to a determination of title...in the unlawful detainer action...." Id. at pps. 57 - 60.

Contrary to Appellant's assertion, the Court of Appeal determined that the law in California is that a court has jurisdiction to determine its own subject matter jurisdiction:

> "...res judicata also applies to the determination by

> a court of its own subject matter jurisdiction. (Estate of Estrem (1940) 16 Cal. 2nd 563, 569)" Opinion, pps. 50 - 51.

In relying on the California Supreme Court decision in Estate of Estrem, supra, Perry v. Superior Court (1985) 174 Cal. App. 3d 1085, and in examining the Restatement Second of Judgments section 12, and Restatement Second of Conflict of Laws section 97, the Court of Appeal stated that:

> "...normal principles of res judicata apply to the determination of subject matter jurisdiction unless that policy is outweighed by the policy against allowing a court to act without jurisdiction." Id. at p. 53.

The Court of Appeal reviewed and considered the various "exceptions" or factors listed by these authorities (Id. at pps. 55 - 56), and concluded that a collateral attack of the 1983 unlawful detainer judgment was not justified:

> "...we note that the issue of the court's jurisdiction was extensively litigated in the municipal court action. We find that this consideration far outweighs the others as it goes to the heart of the policy underlying the doctrine of res judicata." Id. at pps. 56 - 57.

The preclusive law of California is in conformity with rulings of this Court. See Chico County Drainage District v. Baxter State Bank (1940) 308 US 371, 60 S CT 317, 84 L ed 329, and authorities cited therein:

> "The Court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action." Chico County Drainage District, supra at p. 377.

There is, therefore, no substantial federal question in light of prior Supreme Court decisions. Palmer Oil Corp. v. Amerada Petroleum Corp. (1952) 343 US 390, 72 S CT 842, 96 L ed 1022.

Appellant claims that he has been denied an opportunity in the state courts to present his claims concerning the nature of his property rights and the propriety of the 1983 unlawful detainer judgment. After reviewing the extensive record on appeal, however, the Court of Appeal determined that Appellant had fully litigated all his claims in the prior action. It is apparent that Appellant is merely unhappy with the determinations made by the municipal and superior courts in the prior actions. Appellant does not accept the fact that all litigation must, at some time, come to an end.

The Court of Appeal noted that "the doctrine of res judicata 'rests upon the sound policy of limiting litigation by preventing a party who has had one fair adversary hearing on an issue from again drawing it into controversy and subject-

ing the other party to further expense in its reexamination.' (In re Crow (1971) 4 Cal. 3d 613, 622 - 623.)" Opinion, pps. 49 - 50, and concluded:

> "Unlike the court in Vella, we have no difficulty in finding that Nieves was afforded a full and fair opportunity to litigate the issues material to a determination of title. Nieves' claims to ownership in the present case are exactly the same arguments he proposed in the unlawful detainer action to deny the existance of a landlord -tenant relationship. In fact, Nieves went to great lengths in the unlawful detainer action to establish the existence of his equitable interest in the apartment. (See Nieves' Supplemental Trial Brief.) Nieves has had his day in court." Id. at p. 60. (emphasis added)

It is clear that Appellant's claims that he has been denied due process and equal protection under the laws are without merit and do not present any substantial federal question.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that Appellant's appeal should be dismissed, and no writ of certiorari should be granted.

December 16, 1988

Respectfully submitted,

Allan M. Berland

Attorney for Appellee,
Marina Gardens No. 1, Inc.

CERTIFICATE AND DECLARATION

RE

PROOF OF SERVICE BY MAIL

I, Allan M. Berland do hereby declare that I have been advised by the Clerk of this Court that I will be admitted to the Bar of the Supreme Court of the United States on January 9, 1989; that I represent Appellee, Marina Gardens No. 1, Inc., in the within matter; and that all parties required to be served with the Motion of Appellee To Dismiss have been served as follows:

On December 16, 1988, I served the Motion of Appellee To Dismiss on all parties required to be served by placing, on that date, a true copy thereof enclosed in a sealed envelope, and deposited in the United States Postal Service, San Francisco, California, with first class postage prepaid, addressed as follows:

1. One copy in an envelope addressed:

Clerk, California Supreme Court
State Building Room 4250
San Francisco, CA 94102

2. One copy in an envelope addressed:

Clerk, Court of Appeal
5154 State Building
350 McAllister Street
San Francisco, CA 94102

3. One copy in an envelope addressed:

Clerk, Superior Court of San Mateo County
401 Marshall Street
Redwood City, CA 94063

4. One copy in an envelope addressed:

M. Dean Sutton, Esq.
Attorney for Appellant, Reuben Nieves
Fulton Law Firm
1833 The Alameda
San Jose, CA 95126

5. One copy in an envelope addressed:

Hon. John Van de Kamp
California Attorney General
1515 "K" Street
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct, and that this Certificate and Declaration

was executed on December 16, 1988, at San Francisco, California.

Allan M. Berland

State of California)
County of San Francisco) ss.

On this 16th day of December in the year one thousand nine hundred and eighty-eight, before me, the undersigned Notary Public, State of California, duly commissioned and sworn, personally appeared ALLAN M. BERLAND, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County of San Francisco the day and year in this acknowledgment first above written.

C. Salas

NOTARY PUBLIC, State of California

OFFICIAL SEAL
C. SALAS
Notary Public-California
SAN FRANCISCO COUNTY
My Comm. Exp. Oct. 16, 1990